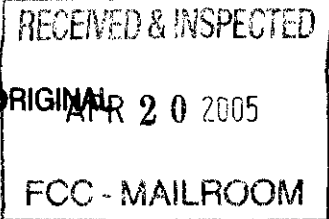


Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)
)
Regulation of Prepaid Calling Card Services) WC Docket No. 05-68
)

COMMENTS
of the
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES
WESTERN TELECOMMUNICATIONS ALLIANCE

I. INTRODUCTION

The Independent Telephone and Telecommunications Alliance (ITTA), the National Telecommunications Cooperative Association (NTCA), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and the Western Telecommunications Alliance (WTA) (collectively, the Associations)¹ hereby file these comments on the FCC's Notice of Proposed Rulemaking (Notice, NPRM) in the above-captioned proceeding.

The FCC should continue to classify as telecommunications services all prepaid calling card services that are similar to the two variants of AT&T's prepaid calling card

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¹ The Associations are membership organizations that collectively represent most of the rate-of-return regulated rural incumbent local exchange carriers (ILECs) providing service in the United States.

service described in its November 2004 letter² to the Commission. Classifying either of these prepaid calling card service variations as information services would significantly exacerbate the opportunities for regulatory arbitrage under the existing intercarrier compensation regimes. Regardless of the incidental “enhancements” that might be added to confuse the issue, these prepaid calling card services are purchased by consumers for one predominant purpose: to make telephone calls.

In addition, the FCC should not assert exclusive federal jurisdiction over prepaid calling card services that are classified as telecommunications services. Asserting exclusive federal jurisdiction over these services would place additional pressures upon interstate mechanisms to replace revenue that rural ILECs would lose from intrastate sources which, if not addressed, would harm rural consumers.

II. ALL PREPAID CALLING CARD SERVICES THAT ARE SIMILAR TO THE TWO VARIANTS OF AT&T’S PREPAID CALLING CARD SERVICE SHOULD CONTINUE TO BE CLASSIFIED AS TELECOMMUNICATIONS SERVICES³

Were the Commission to classify as information services either of the two prepaid calling card variations described in AT&T’s Nov. 22 letter, it would be opening the floodgates for all prepaid calling card service providers to avoid universal service assessments and access charge obligations. This would create substantial and harmful new opportunities for regulatory arbitrage, in direct contravention of the Commission’s

² Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 22, 2004) (AT&T Nov. 22 Letter).

³ The Associations’ understanding of the Order on AT&T’s Petition for Declaratory Ruling regarding enhanced prepaid calling card services is that at present, all prepaid calling card services, including the two variants to AT&T’s service, remain classified as telecommunications services. Paragraph 4 of the Order states that “[t]o date, calling card services have been regulated by the Commission as telecommunications services...” In addition, footnote 4 of the Order notes that the instructions to FCC Form 499-A state that “[a]ll prepaid card revenues are classified as end-user revenues.” See, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Order and Notice of Proposed Rulemaking, FCC 05-41, ¶4, fn. 4 (rel. Feb. 23, 2005)(Order).

stated goals in the pending intercarrier compensation reform proceeding.⁴ It would also jeopardize the universal service and access revenue streams that are critical to rural ILECs' ability to provision affordable, high-quality service to their customers.

In its 1998 Report to Congress in CC Docket No. 96-45, the FCC stated that "... the classification of a service under the 1996 Act depends on the functional nature of the end-user offering."⁵ From the end-user's perspective, the functional nature of the two variants of AT&T's prepaid calling card service is the ability to make telephone calls. As Commissioner Adelstein correctly noted in his statement on the Order concerning AT&T's Petition for Declaratory Ruling, "...the services [of AT&T's original card and the new variants] appear functionally the same from the perspective of the consumer."⁶ Therefore, just like the calling card service addressed in the Order, the two variants to AT&T's prepaid calling card service, as well as other functionally similar prepaid calling card services, should continue to be classified as telecommunications services.

The first prepaid calling card variant described in the NPRM gives the customer the option to listen to additional information about the card distributor's business before listening to an advertising message and ultimately making a phone call. This option to listen to additional business information is an adjunct that is wholly incidental to the basic voice telecommunications service. No different than the calling card service which

⁴ See, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-33, ¶33 (rel. March 3, 2005) (Intercarrier Compensation FNPRM). ("We favor an approach that provides regulatory certainty where possible and limits both the need for regulatory intervention and arbitrage concerns arising from regulatory distinctions unrelated to cost differences. Similar types of traffic should be subject to similar rules.")

⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11543, ¶86 (1998).

⁶ Order, Statement of Commissioner Jonathan S. Adelstein.

the Order addresses, this variant does not “alter the fundamental character” of the voice telecommunications service being provided.⁷

From the customer’s point of view, the option to access additional information about the card distributor’s business, web site, etc. is merely a precondition (in most cases, undesirable) to using the card for the purpose for which it was purchased – to make telephone calls. Even if, *arguendo*, providing the customer with the option to access additional information about a merchant meets the literal definition of an information service, it remains incidental to the underlying voice telecommunications service for which the customer purchased the card. Just like the automatic advertising message that is provided in the service addressed in the Order, the new optional information “...is not in any sense an integral or essential part of the service AT&T offers to consumers.”⁸ Customers buy the cards to make calls, not listen to ads.

AT&T asserts that it makes available this new optional information in its prepaid calling card service “to meet customer needs.”⁹ One would gather from such an assertion that the additional information that can be accessed would be a strong selling point for AT&T. Yet, AT&T’s webpage for its prepaid phone cards makes no mention of the incidental ability to access merchant information. Instead, AT&T advertises its prepaid cards on its website as a tool for “smart and simple calling” that enables consumers to

⁷ *Ibid.*, para. 16.

⁸ *Id.*, para. 20. In fact, one of the options for additional information AT&T cites as an example would be the ability to learn how to add more minutes to the calling card at the card distributor’s store. See, AT&T Nov. 22 Letter, p. 3. This information goes to the heart of what the card is purchased for to begin with – plain old telephone service.

⁹ See, AT&T Nov. 22 Letter, p. 2.

make "local, long distance & international calls."¹⁰ In other words, AT&T markets its prepaid phone cards as an easy way to make telephone calls, not listen to advertising.¹¹

AT&T's own marketing of its prepaid phone cards confirms that the optional information made available through the variants to the service "...is completely incidental to [the service AT&T offers to consumers] and therefore not sufficient to warrant reclassification of the service as an information service."¹² As Commissioner Copps stated in his concurring statement on the Order, "[t]here may be a bright line out there between services subject to regulatory authority and those that are not. But I doubt [that whether or not they feature an automated voice that coos on the line 'press 1 for more information'] is it."¹³

The Order makes clear that the customer's purpose for buying a prepaid calling card is relevant to determining its appropriate regulatory classification. In the Order, the Commission stated that "[f]rom the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call and therefore the service should be classified as a telecommunications service."¹⁴ The Commission also agreed with commenters that "...subscribers buy AT&T's calling cards to make telephone calls, not listen to advertisements."¹⁵

¹⁰ See, www.consumer.att.com/prepaidcard/.

¹¹ AT&T also advertises new prepaid phone cards that are available at Sam's Club and Wall-Mart that have add-on features for which fees are deducted from the card when the features are used. These features include PIN-less dialing, lost card protection, three-way calling, voice mail and speed dial. However, none of the features advertised include the option to access additional information about the card distributor's business. The features that are advertised are adjuncts to basic service that do not convert the overall calling card service into an information service.

¹² Order, para. 20.

¹³ *Id.*, Statement of Commissioner Michael J. Copps, Concurring.

¹⁴ *Id.*, ¶16 (emphasis added).

¹⁵ *Id.*, ¶20.

Prepaid calling card variations like those described in the NPRM are purchased by consumers for the same purpose as the calling card service addressed in the Order. The inclusion of a menu that allows the customer to hear additional merchant-related information is just another “hoop” the customer must jump through before he/she can make a phone call. It does not change the reason why the customer purchases the prepaid calling card and should therefore not alter the service’s classification as a telecommunications service.

In the second prepaid calling card variant discussed in the NPRM, transport associated with calling card calls is provided over an Internet backbone network using Internet Protocol (IP) technology. The use of IP technology to deliver calls placed using prepaid calling cards is not a relevant factor in determining the service’s statutory classification. A prepaid calling card service that uses “IP-in-the-middle” meets all three criteria for phone-to-phone IP telephony services the Commission determined to be telecommunications services in the AT&T IP Telephony Order.¹⁶

The fact that calls made with a prepaid calling card service require 8YY dialing as opposed to 1+ dialing should not alter the determination that it meets the criteria for a phone-to-phone IP telephony service that is a telecommunications service. It would make no sense to classify as an information service a service that meets the three stated criteria in the AT&T IP Telephony Order and is the same in virtually every way as regular presubscribed interexchange service except for the fact that it uses 8YY dialing.

¹⁶ *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, ¶1 (2004) (AT&T IP Telephony Order). The FCC determined that an interexchange service that utilizes “IP-in-the-middle” is a telecommunications service if it meets the following three conditions: (1) it uses ordinary customer premises equipment with no enhanced functionality; (2) it originates and terminates on the public switched telephone network; and (3) it undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider’s use of IP technology.

Phone-to-phone interexchange service initiated through 8YY dialing is a telecommunications service just as 1+ interexchange service is.

In addition, a prepaid calling card service provider that utilizes "IP-in-the-middle" to transport calls imposes the same costs on a rural ILEC's network as a prepaid calling card service provider that does not use IP. The functions performed by the originating and terminating LEC for phone-to-phone IP calls are no different than the access functions they perform for regular interexchange calls transported without IP technology.

It would create significant regulatory arbitrage opportunities were the Commission to classify prepaid calling card services that use "IP-in-the-middle" as information services, while functionally equivalent prepaid calling card services that do not use IP were classified as telecommunications services. In the AT&T IP Telephony Order, the FCC determined that there is "...no benefit in promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules..."¹⁷ Furthermore, in the IP-Enabled Services NPRM, the FCC "maintain[ed] that the cost of the PSTN should be borne equitably among those that use it in similar ways."¹⁸ Therefore, the Commission should classify prepaid calling card services that utilize "IP-in-the-middle" and meet the three criteria set forth in the AT&T IP Telephony Order as telecommunications services.

III. THE FCC SHOULD NOT ASSERT EXCLUSIVE JURISDICTION OVER PREPAID CALLING CARD SERVICES THAT ARE CLASSIFIED AS TELECOMMUNICATIONS SERVICES

There is no valid reason for the Commission to assert exclusive federal jurisdiction over prepaid calling card services that are classified as telecommunications

¹⁷ *Id.*, 19 FCC Rcd 7468, ¶17.

¹⁸ *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4885, 4904, ¶¶33, 61 (2004) (IP-Enabled Services NPRM).

services. The Commission has previously found that prepaid calling cards are jurisdictionally mixed.¹⁹ This enables states to require the payment of intrastate access charges for toll calls made with prepaid calling cards that originate and terminate within the same state. Similarly, it permits states to require contributions to state universal service funds from these service providers.

Were the FCC to declare exclusive jurisdiction over prepaid calling card services that are telecommunications services, it would usurp the jurisdiction over intrastate communications service that states are granted under the Communications Act.²⁰ In so doing, the Commission would undermine state regulators' ability to ensure that rural ILECs providing intrastate services to subscribers in the state are fairly compensated and supported through intrastate access charges and state universal service funding. This would place additional pressures on interstate mechanisms to compensate for the revenue rural ILECs would lose from intrastate sources which, if not accommodated, would place upward pressure on local end-user rates. Were end-user rates to remain unchanged, and revenue shortfalls were to occur, carriers would not have the necessary capital to invest in their networks, thereby hindering the continued deployment of advanced services and potentially causing a decline in service quality. In either case, rural consumers would be harmed.

Furthermore, asserting exclusive federal jurisdiction over prepaid calling card telecommunications services would exacerbate the regulatory arbitrage opportunities under the existing intercarrier compensation regimes, which the FCC is seeking to

¹⁹ Order, ¶22 (citation excluded).

²⁰ 47 U.S.C. §152(b).

address in its comprehensive proceeding on intercarrier compensation reform.²¹ It would also prejudice some of the critical issues raised in that proceeding as well as the proceeding on IP-enabled services.²²

The FCC's recent Vonage Order does not have any relevance to a jurisdictional determination on prepaid calling card telecommunications services. In the Vonage Order, the Commission asserted exclusive federal jurisdiction over Vonage's DigitalVoice service because it found that the characteristics of that service preclude a practical identification of, and separation into, inter- and intrastate communications, and that permitting state regulations would thwart federal law and policy.²³ This is not the case with prepaid calling card telecommunications services. The inter- and intrastate communications made with prepaid calling card services have historically been identified and separated, and the degree of difficulty of this process is not altered by the use of IP technology to carry a call. "IP-in-the-middle" is just another method of transport. Moreover, state regulation of the intrastate component of these services does not conflict with or encroach on the FCC's rules or policies regarding the interstate component of the services. The FCC should therefore continue to find that prepaid calling card services that are telecommunications services are jurisdictionally mixed.

IV. CONCLUSION

For the reasons discussed above, the Commission should continue to classify as telecommunications services all prepaid calling card services that are similar to the two variations discussed in the AT&T Nov. 22 Letter and the NPRM. The Commission

²¹ Intercarrier Compensation FNPRM, ¶¶15, 33.

²² See generally, Intercarrier Compensation FNPRM; IP-Enabled Services NPRM.

²³ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22411, ¶14 (2004)(Vonage Order).

should also decline to declare exclusive jurisdiction over prepaid calling card services classified as telecommunications services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brian J. Ford, hereby certify that a copy of the Associations' comments was sent by first class United States mail, postage prepaid, or via e-mail, on this, the 15th day of April, 2005, to those listed on the attached list.

By: /s/ Brian J. Ford

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